IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 22ND AUGUST 2007 / 31ST SRAVANA 1929

Crl.Rev.Pet.No. 1509 of 2007()

CRA.269/2004 of ADDL.SESSIONS COURT, PATHANAMTHITTA
CC.933/2003 of JUDL.MAGISTRATE OF FIRST CLASS COURT-I, PATHANAMTHITTA

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REVN. PETITIONER: APPELLANT/ACCUSED

ASHALATHA,
YOOKAY VILLA, KAVUMBHAGOM, THIRUVALLA.

BY ADV. DR.K.P.SATHEESAN
SRI.K.K.GOPINATHAN NAIR
SRI.M.R.JAYAPRASAD
SRI.K.K.RAJEEV

RESPONDENTS: STATE & COMPLAINANT

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1. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

2. JACOB THOMAS,
MULAMOOTTIL HOUSE, KOZHANCHERRY,
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
V.K.ABRAHAM, MANAGER, MULAMOOTTIL BANKERS,
PATHANAMTHITTA.

BY ADV. SRI.V.PHILIP MATHEW

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 3/08/2007, THE COURT 22-08-2007 PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.R.P. No. 1509 of 2007

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Dated, this the 22nd day of August 2007

ORDER

In this revision filed under Sec. 397 read with Sec. 401 Cr.P.C. the petitioner who was the accused in C.C. 933 of 2003 on the file of the J.F.C.M.-I, Pathanamthitta challenges the conviction entered and the sentence passed against him concurrently by the courts below for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act" for short).

2. I heard Adv. Sri. K.P. Satheesan, the learned counsel for the revision petitioner and Advocate Sri. Philip Mathew, the learned counsel for the second respondent/complainant.

ARGUMENT OF THE ACCUSED

3. Assailing the conviction entered and the sentence passed against the revision petitioner, his learned counsel Dr.K.P. Satheesan, made the following submissions before me in support of the revision:-

The complaint in this case was not filed by the complainant Jacob Thomas but by his power-of-attorney holder V.K. Abraham. A power-of-attorney has no role to play in representing the parties in criminal proceedings. However, in view of the various judicial pronouncements in this regard, complaints under Sec. 138 of the N.I. Act can be filed or continued by

powers-of-attorney. But such a power-of-attorney can file or continue a complaint only with the prior permission of the court for which purpose the motion must come from the party himself, i.e., the payee or holder-in-due-course (the complainant) and not the power of attorney. No permission was sought in this case either by the complainant or by the power-of-attorney holder under Sec. 302 Cr.P.C. or any other provision of law. Hence, the entire proceedings initiated and continued were illegal and a nullity in the eye of law. Under Section 302 (2) Cr.P.C. any person conducting the prosecution may do so either personally or through a pleader. But if the complainant were to conduct the prosecution through a private person including a power-of-attorney *(who is not a "pleader" within the meaning of Section 2 (q) Cr.P.C.)* the complainant himself must obtain the permission of the Court and not his power-of-attorney holder. There is nothing in the proceedings of the trial court to show that such permission was ever sought by the complainant or granted by the court. A defective prosecution without the requisite authority is not a curable irregularity but a total illegality. The evidence of P.W.1 the power-of-attorney holder suffers from the following defects:-

a) He is not the person who allegedly lent the money

b) He is not the person who is entitled to get back the money

c) He is not the person who can legally claim

the amount due under the cheque in question

d) He is not the person who allegedly received the cheque from the accused.

e) He is not the person who presented the cheque in the drawee bank or got it dishonoured from the bank

f) He is not the person who sent the statutory notice demanding the amount from the accused.

g) He is not the person who received the reply notice from the accused.

h) He is not the person who has personal knowledge about the financial transaction between the complainant and the accused.

i) He is not the person competent to depose in respect of matters which are not within his personal knowledge.

j) He is not the person entitled to get any document including the deed of power-of-attorney marked during trial as the said deed was executed by another person.

If the power-of-attorney of the complainant were to engage a pleader or legal practitioner then it would amount to a delegate further delegating his function offending the well-known maxim *"delegatus non potest delegare".* In **Mathai v. Principal District and Sessions Judge – 1999 (1) KLT 157,** a learned single Judge of this Court held that there must be a specific request by the parties to the court for their representation in

Court by a person who is a non- advocate and that a general power-of-attorney was not sufficient. The learned Judge in this connection relied on the decision of the Apex court in **Hari Shankar Rastogi v. Girdhari Sharma and Anr. - AIR 1978 SC 1019** where also it was held that the party to a criminal proceeding should seek permission of the court to be represented by a private person who is not an advocate. Again in T**.C. Mathai and Another v. District and Sessions Judge, Thiruvananthapuram – 1999 (3) SCC 614** it was held by the Supreme Court that a power-of-attorney holder who is not a legal practitioner cannot represent a husband and wife arrayed as respondents in a criminal revision unless the husband and wife themselves seek the permission of the court in view of Section 303 read with Sec. 2 (q) Cr.P.C. In **Jimmy Jahangir Madan v. Bolly Cariyappa Hindley – 2004 (12) SCC 509** the Supreme Court ruled that the application under Sec. 302 Cr.P.C. to continue the prosecution could not be filed by the power-of-attorney holder of the heirs of the deceased complainant in a prosecution under Sec. 138 of the N.I. Act. It was held that the permission in that regard should be sought by the heirs of the deceased complainant. In **Babu v. State of Kerala – 1984 KLT 164** a Division Bench of this Court had held that only in exceptional cases should the court allow the prosecution to be conducted by a private lawyer engaged by a party instead of the Public Prosecutor. In **Dr. Bhagwant Singh v. Surjit Singh - 1985 Crl.L.J. NOC 73** a learned single Judge of the Punjab

and Haryana High Court held that even though for the presentation of the complaint the physical presence of the complainant before Court is not always essential, the normal rule is that he should be present in court unless he has justifiable reasons for not doing so. In **H. Mohan v. State of Karnataka**, a learned Judge of the Karnataka High Court has held that it is clear from the language employed by Section 142 of the N.I.Act that no court shall take recognizance of an offence punishable under Sec. 138 except upon a written complaint made by the payee and this means that the payee himself has to file the private complaint under Sec. 200 Cr.P.C. before the competent Magistrate. On the question regarding the competence of the power-of-attorney – holder to give evidence as a witness before court in **Joseph Mathew v. Jose Thomas - 2005 (4) KLT 764 (SC)** it was held by the Apex Court that it is impermissible for the son of the landlord holding a power-of-attorney of the landlord to give evidence in support of the bonafide need of the landlord. Again in **Janki Vashdeo v. Indu Sind Bank – 2005 (2) SCC 217** the Apex Court held that even though a general power-of-attorney can appear, plead and act on behalf of the party he cannot become a witness on behalf of the party for the purpose of giving evidence in respect of matters over which the party alone has personal knowledge. The conviction entered and the sentence passed against the revision petitioner overlooking the above vital aspects of the matter cannot be sustained.

JUDICIAL RESOLUTION

4. I am afraid that I cannot agree with the above defence contentions which overlook the fact that in most of the prosecutions (including the one on hand) under Section 138 of the N.I. Act, where a complaint is filed through a power-of-attorney, the holder of the power-of-attorney is not appointed or authorised to conduct the prosecution. The power-of-attorney comes in the picture only to fill the position of the complainant. The prosecution in such cases is conducted by the pleader or Advocate engaged by the power-of-attorney. There is, therefore, no occasion or need in such a case to invoke Section 302 Cr.P.C. much less, seek the permission of the Court to conduct the prosecution either by the complainant or by the power-of-attorney.

5. The law relating to power-of-attorney is a branch of the law of agency. Power - of-attorney is the legal written authority to transact business for another. It is the authority or power to act conferred upon an agent. The formal instrument or document by which that power or authority is conferred or guaranteed is also called "power-of-attorney". The person empowering another to represent him or act in his stead is called the donor or the principal and the person in whom authority is so conferred is called the donee or the holder of the power-of-attorney. A general power-of-attorney is one by

which authority is given to act for the principal in all matters of a particular nature or concerning a particular business. A special power-of-attorney is one by which authority is given to do some particular specified act. A vakalathnama by which a party to a proceeding before a Court or Tribunal authorises a legal practitioner to appear and act on his behalf is also a power-of-attorney. Section 2 of the Powers-of Attorney Act, 1882 reads as follows:-

> 2. *Execution under power-of-attorney:- The donee of a power-of-attorney may, if he thinks fit execute or do any instrument or thing, in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with signature and seal, of the donor thereof.*
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> *This section applies to powers-of-attorney created by instruments executed either before of after this Act comes into force".*

6. The above provision is the statutory recognition of the maxim *'Qui facit per aiium facit per se'* which means that he who does anything by another does it by himself. In other words, the general rule is that whatever a person may do himself he may authorise another to do for him. **In Hamza v. Ibrahim - 1994 (1) KLT 622** the question before a learned single judge of this Court (Mr. Justice K.T. Thomas) was as to whether the power-of-attorney-holder could make a complaint under Sec.

142 of the Negotiable Instruments Act, 1881 on behalf of the payee or holder-in-due-course. This is what the learned Judge observed:

> *"8. "Power of attorney" is the instrument by which a person is authorised to act as the agent of the person granting it (vide Black's Law Dictionary) . In Stroud's "Judicial Directory", power of attorney is described as "an authority whereby one is set in the turne, stead, or place of another to act for him". Stone, C.J. has adopted the said definition as effective and acceptable in Ramdeo v. Lalu Natha. Section 2 of the Power of Attorney Act, 1882 empowers the donee of a power of attorney to do anything "in and with his own name and signature" by the authority of the donor of the power. The section declares that everything so done "shall be as effectual in law as if it had been .....done by the donee of the power in the name and with the signature ..... of the donor thereof, (shorn of words which are not necessary in this context). In the light of such declaration, the legal position is that the power of attorney holder can do everything empowered by the donor and all such acts done by the donee shall have legal recognition and acceptance as though such acts were done by the donor himself.*
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> *9. Making a complaint before a court is not an act which would fall within the exceptions envisaged by Venkatarama Ayyar, J. in Ravulu Subba Rao v. Income Tax Commissioner -AIR 1956 S.C. 604 - Patanjali Sastri, J. (as he then was) had stated in I.T. Commissioner v. Subba Rao -AIR 1946 Madras 411 that section 2, Power of Attorney Act cannot override the specific provision of a rule made under a different statute*

> *which requires that a particular act should be done by some one "personally". The bench was considering the effect of adding the word "personally" in rule 6 of the Income Tax Rules framed under section 59 of the Income Tax Act as per which an application for registration under section 26 A of the Income Tax Act should have been signed by the partner personally. It was the said decision of the Madras High Court which reached the Supreme Court in Ravulu Subba Rao v. Income Tax Commissioner . But the principle enunciated in the said decision has no application to Section 142 of the N.I. Act since there is no requirement in it that the complaint should be made by the payee or holder in due course "personally". Parliament would have advisedly refrained from imposing such a restriction".*

In **Muthukaruppan v. Raghavan – 2006 (2) KLT 996** a learned Single Judge of the Madras High Court has held that a complaint can be signed and filed and sworn statement also can be given by the power-of-attorney of the payee or holder-in-due course, but at the time of the trial of the payee or holder-in-due-course himself will have to mount the witness box. I will have occasion to deal with the testimonial competence of the power-of-attorney to give evidence, a little later.

7. Thus, the law does not insist that the payee or holder-in-due -course should personally file the complaint. A duly authorised power-of-attorney can file the complaint on behalf of the payee or holder-in-due-course. So long as the power-of-attorney does not seek to conduct the prosecution on behalf of

the payee or holder in due course, the question of seeking permission in that behalf under Section 302 Cr.P.C. or the question as to who should seek such permission, do not arise.

8. In **Hari Shankar Rastogi's** case – AIR 1978 SC 1019 the question was as to whether a private person who was not an Advocate could be permitted to conduct the case of the party before Court. The Apex Court held that such a private person must get the prior permission of the Court for which the motion should come from the party himself and not the private person. This ruling cannot obviously apply to the present case since this is not a case where the power-of-attorney holder is seeking permission to conduct the case on behalf of the complainant. Likewise, the learned single Judge of this Court in **Mathai v. Principal District and Sessions Judge - 1999 (1) K.L.T.157,** the Division Bench of this Court in **T. C. Mathai v. Principal District & Sessions Judge - 1999 (2) KLT 108** and the Hon'ble Supreme Court in **T.C. Mathai and Anr. v. District and Sessions Judge, Thiruvananthapuram- 1999 (3) SCC 614** were all dealing with the question as to whether a private person who is not a legal practitioner and who is holding a power-of-attorney from the party could be permitted to conduct the case of such party. The courts took the view that such a private person could not conduct the case of the party without the prior permission of the court and that such permission should be sought not by the power-of-attorney-holder but by the party himself. In **Jimmy Jahangir's** case – **2004 (12) SCC 509** the

question was evidently as to whether the power-of-attorney-holder could continue the proceedings after the death of the complainant in a prosecution under Section 138 of the N.I. Act without the legal heirs of the complainant seeking permission under Sec. 302 Cr.P.C. The very fact that Sec. 302 Cr.P.C. was invoked and interpreted will show that the power-of-attorney who was not a "pleader" within the meaning of Sec. 2 (q) Cr.P.C., was not merely seeking to represent the legal heirs of the deceased complainant but was seeking to conduct the prosecution on their behalf in which case alone Sections 205 and 302 Cr.P.C. could have any application. In view of the decision in **Hamza's** case – **ILR 1994 (1) Kerala 622** to the effect that the power-of-attorney-holder of a payee or holder-in-due-course can file the complaint on behalf of the complainant, the view taken in **Dr. Bagwant Singh's** case **(1985 Crl.L.J NOC 73)** by the **Punjab & Haryana High Court** that the complainant should be personally present at the time of presentation of the complaint before the Magistrate cannot have application, particularly, in a prosecution under Section 138 of the N.I. Act. It is pertinent to remember in this connection the decision of a learned Single Judge of this court in **Rajan George v. State of Kerala – 1998 (2) KLT 497** wherein it was held that since the complainant was hospitalised on the last day of limitation, the complaint filed on his behalf by his pleader in the absence of the complainant could be treated as properly instituted and that the case could be posted to some future date for the purpose of

recording the sworn statement of the complainant. That was also a prosecution under Section 138 of the N.I. Act. There is, therefore, no justification whatsoever in insisting on permission of the court either by the complainant (payee or holder-in-due-course) or his power-of-attorney-holder if the purpose for which the power-of-attorney-holder is appointed is only to represent the complainant i.e. to play the limited role of taking the place of the complainant and nothing more and nothing less. This legal position is in no way different if the complainant were to die pending the proceedings and his legal heirs were to appoint a power-of-attorney-holder for the very same purpose.

9. The only other question which is required to be considered is as to whether the power of attorney holder is competent to give evidence on behalf of the complainant. In **Janki Vashdeo's case - (2005 (2) SCC 217)** the decision was rendered in a civil proceedings. Interpreting the various provisions under the Code of Civil Procedure, 1908 particularly Order 3 Rule 1 it was held that the power of attorney cannot depose in respect of matters which are in the exclusive knowledge of his principal. In **Joseph Mathew's case - (2005 (4) KLT 764)** also eviction was sought on the ground of bonafide need of the landlord and not that of his son. Hence it was held that it was impermissible for the son who was holding the power-of-attorney of the landlord to give evidence in support of the bonafide need of the landlord. This case again was a civil proceeding.

10. By the power-of-attorney-holder of the complainant giving instructions to the advocate for sending the statutory notice or for the conduct of the case he is not offending the principle of *delegatus non potest delegare*. In **Pandalai v. Jacob C. Alexander – 2000 (2) KLT 59** it was held by this Court that as long as the power-of-attorney of the payee of a cheque in a prosecution under Section 138 of the N.I. Act does not act or plead for the principal, there is no legal impediment in his giving instructions to the Advocate. In **Anirudhan v. Philip Jacob – 2006 (3) KLT 554** this Court had held that the power-of-attorney of the complainant in a prosecution under Section 138 of the N.I. Act will be a competent witness if he were to speak of facts which are within his knowledge. In the case on hand, the power-of-attorney who was examined as P.W.1 is none other than the Manager of the complainant who is running a financial institution by name Mulamoottil Bankers. Since he was fully conversant with the facts starting with the borrowal and ending with the filing of the complaint, he was perfectly competent to give evidence on behalf of the complainant. Both the courts have considered and rejected the defence set up by the revision petitioner while entering the finding of guilt. The said finding has been recorded on an appreciation of the oral and documentary evidence. I do not find any error, illegality or impropriety in the finding so recorded concurrently by the courts below. The conviction was thus rightly entered against the petitioner and I confirm the same.

11. What now survives for consideration is the question as to whether a proper sentence has been imposed on the Revision Petitioner. Having regard to the facts and circumstances of the case, I am inclined to modify the sentence imposed on the revision petitioner. Accordingly, if the revision petitioner pays to the first respondent complainant by way of compensation under Sec. 357 (3) Cr.P.C. a sum of **Rs. 1,00,000/- (Rupees one lakh only)** within **four months** from today, then he need to undergo only imprisonment till the rising of the court. If the revision petitioner commits default in making the payment as aforesaid,he shall undergo simple imprisonment for three months by way of default sentence.

12. Amounts, if any, paid by the revision petitioner pursuant to the orders, passed by the lower appellate court or this Court shall be refunded to the petitioner.

13. In the light of the foregoing discussion, the inescapable conclusion is as follows:

> *i) Since the law does not insist that the payee or holder-in-due-course should personally file the complaint, his duly authorised power-of-attorney can file the complaint on his behalf.*
>
> *ii) As long as there is no request before court that the power-of-attorney-holder of the complainant (payee or holder-in-due-course) should be permitted to conduct the prosecution without engaging a pleader or legal practitioner, there is no question of Sec. 302 Cr. P.C. coming into operation obliging the complainant himself to seek permission of the Court to allow the power-of-attorney-holder to conduct the*

prosecution.

iii) Such power-of-attorney can also give evidence before court on behalf of the payee or holder-in-due-course if the facts necessary to secure a conviction are within his personal knowledge.

This Revision is disposed of confirming the conviction but modifying the sentence as above.

V.RAMKUMAR,JUDGE.

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